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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 546

CITY OF MERIDIAN
DEFENDANT—APPELLANT

v.

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY
PLANTIFF—APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS AND/OR AFFIRM

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The Appellant, pursuant to United States Supreme Court Rule 16 (c) 3, files this its brief opposing Appellee's Motion to Dismiss and/or Affirm. Appellee's motion was received by counsel for Appellant on December 24, 1958.

STATEMENT OF THE CASE

This case has already been stated in our Statement as to Jurisdiction (pp. 8-15) and Appellee's Motion (pp. 2-5).

ARGUMENT

Appellee sets out two grounds for argument in its motion and brief:

I. This case is not reviewable by appeal.

II. The decision below is clearly correct.

Appellant will take up these arguments in the order set out by Appellee, taking the converse position in each case.

I. THIS CASE IS REVIEWABLE BY APPEAL

Counsel's argument under this point is based on the fact that they raised the question in the lower courts that the charge sought to be made for their use of city streets violated the contract clause of the state constitution as well as of the federal constitution. An examination of the opinions of the District and Circuit Courts, (which contain the Courts' language as to its finding and not counsel's) however, will reveal that this case was decided on the basis that the attempt to charge Appellee for use of city streets violated the federal constitution. Both of these opinions are set out in full on pages 13-27 and 1-12 of the Appendix to Statement as to Jurisdiction herein. Although both the District and Circuit Courts recognized that Appellee was also relying on the state constitution, both Courts refrained from discussing the state constitution, but put the basis of their adjudication squarely on the protection of the federal constitution. At the outset the District Judge made the following statement:

"The principal question for solution is whether

or not an irrevocable franchise was granted . . . and whether or not the telephone company accepted that grant so as to constitute a contract protected *by the federal constitution.*" (Italics ours). (Appendix to Statement as to Jurisdiction, p. 13).

The learned District Judge said further:

> "The authorities are unanimous that it is a binding contract and to change its terms would be to impair the obligations of a contract and conflict with the *U. S. Constitution.*" (Italics ours) (Appendix to Statement as to Jurisdiction, p. 20).

In his concluding paragraph as to the rights originally created, the District Judge summed up his finding as follows:

> "Under the stipulation and documents offered in evidence it is clear that the Act of 1956 by the Mississippi State Legislature, if it undertakes to authorize a municipality to impose the charges, is beyond the power of the Legislature and would conflict with *the Constitution of the United States.*" (Italics ours) (Appendix to Statement as to Jurisdiction, p. 23)

In his opinion the learned District Judge recognized that the state courts had held previously that the Mississippi Statute gave only a revocable license and not a contract protected by either the state or federal constitution. Referring to the adjudication of the Supreme Court of Mississippi in *Hodges v. Western Union Telegraph Company,* 72 Miss. 910, 18 So. 84, the District Judge said:

> "It further held that the Act was a license to the

company to use the streets, *but was revocable at the will of the legislature.*" (Italics ours) (Appendix to Statement as to Jurisdiction, p. 20).

Other than an attempt to distinguish *Memphis v. Postal Telegraph and Cable Company*, 145 Fed. 602, and a short discussion of *Hodges* and another Mississippi case, the Circuit Court's opinion was confined to a statement of the contentions and the approval of the "thoughtful and thorough opinion" of the District Judge. In its discussion of the Mississippi cases, although the Circuit Court did not fully concur with the District Judge in his view that *Hodges* adjudicated that the permission was revocable at the will of the legislature, it pretermitted any decision as to the state law on the subject, stating:

> "For, *under the federal decisions cited and relied on by the Court below*, the offer of the statute when accepted became a contract beyond the reach of impairment by either legislative or judicial action and any decision of the Mississippi Supreme Court *must yield to the decisions of the Supreme Court of the United States to the contrary.*" (Italics ours) (Appendix to Statement as to Jurisdiction, p. 10)

The decision of the Supreme Court of Mississippi in *Hodges* determined the nature of Appellee's right under the statute in question insofar as the state law is concerned. It was there necessary for the Court to make a determination of the telephone company's rights in order to then determine whether or not they could be charged at that time. Therefore, the holding that the right obtained was a revocable permit, even though it had not been revoked at that time, was a statement of the law of Mississippi under

the rule of stare decisis, even though it is not res judicata insofar as the case at bar is concerned. It was, therefore, necessary for the District and Circuit Courts to place the basis of their decision on the federal question involved which, as shown hereinbefore, they did.

We submit further that counsel seeks to place too narrow a construction on 28 U. S. C., Section 1254 (2) and one which has never been recognized by this Court. The case cited by counsel (*U. S. v. Hastings*, 296 U. S. 188, 193; 80 L. Ed. 148, 150, 151; 56 S. Ct. 218) supports the position of Appellant rather than Appellee. That case involved an appeal by the government under U. S. C. A., Title 18, Section 682 (Criminal Appeals Act) as it read in 1935. Under the statute such appeals were confined to cases in which demurrers were sustained based upon the invalidity or construction of the statute upon which the indictment was founded. The Court held that the appeal was proper unless a *wholly independent* ground was the foundation of the judgment. The reason given by the Court was that if wholly independent grounds of insufficiency existed, the judgment of the District Court would remain in effect and the appeal would only amount to an expression of an abstract opinion, which might or might not fit a subsequent prosecution. In the case at bar, it cannot be said that the judgment below rests on any independent basis which would make the decision of this Court only an abstract opinion. A decision by this Court that Appellee does or does not now hold a contract by virtue of the state statute, which is protected by the federal constitution, will finally determine the rights of the parties here, regardless of the state constitution or its interpretation by the state courts.

The appeal statute relied on here clearly states that a

party has a right to appeal who relies on a state statute which has been held by a Court of Appeals to be invalid as repugnant to the Constitution of the United States. That is clearly the case before this Court. Appellant is relying on Section 5 (e) of Chapter 372 of the Mississippi Laws of 1956 (Statement as to Jurisdiction, pp. 2-3). This state statute has been held invalid as repugnant to the Constitution of the United States. The limitation that the appeal shall be restricted to the federal questions presents no problem here because there exists no independnt basis for any opinion othr than one based on a decision of the federal questions presented.

Within the last year this Court held that an appeal was proper where it was charged that a state tax discriminated against the federal government, even though it was necessary for the Court to determine that under the state law the nature of the tax was such as not to impose a tax on government property. *Detroit v. Murray* Corporation, 355 U. S. 489, 2 L. Ed. (2d) 441, 78 S. Ct. 458.

This decision further demonstrates that this Court will not engage in such legalistic hair splitting with reference to its jurisdiction as counsel for Appelle urges. In *Detroit* the Appellant appealed and then filed a petition for certiorari in the face of the statutory provision (U. S. C. Title 28, Section 1254 (2)) precluding the filing of such petition, after an appeal had been taken. The Court very properly took the liberal view that a proper case was presented to it for decision and took jurisdiction under both the appeal and the petition for certiorari. The statutes require consideration by this Court as if on a petition for certiorari in certain appeal cases. Even if we are mistaken in our contention that this is a proper case for appeal, certainly, under its broad

judicial powers, this Court can consider the question here as though presented by certiorari. After all, under the present rules of the Court, there is very little, if any, substantial difference in the two methods of review.

Counsel have overlooked question 1d set out on page 7 of our Statement as to Jurisdiction. This question is whether or not the state statute relied on by Appellee was itself a violation of the Fourteenth Amendment of the United States Constitution. It is sufficient alone to give this Court jurisdiction of this appeal. On that issue there is no question of state law whatsoever.

If we are mistaken, however, in our contention that this Court has jurisdiction to hear the case on this appeal, because there is a state question involved; then the proper procedure is, not to dismiss this appeal, but to reverse this cause and remand it to the District Court with directions to retain the bill pending a determination of proceedings to be brought with reasonable promptness in the State Court. *Railroad Commission v. Pullman Company*, 312 U. S. 496, 85 L. Ed. 971. The Federal Courts, in the exercise of their discretionary powers as courts of equity, will refrain from the unnecessary decision of constitutional questions to enable the parties to litigate first in the State Courts, questions of State law, decision of which is preliminary to, and may render unnecessary decision of the constitutional questions presented. *Merideth v. City of Winter Haven*, 320 U. S. 228, 236; 64 S. Ct. 7, 12. If counsel is right that there is still a question of state law preliminary to the decision of the federal question, which may render unnecessary a decision on the federal question presented, then certainly this is a case in which proceedings should be stayed until the parties have litigated the state

question in the State Courts.

This principle is particularly applicable to a case involving a declaratory judgment concerning the revenue of a state or its political subdivisions as is true of the case at bar. *Great Lakes Dredge and Dock Company v. Huffman*, 319 U. S. 293; 63 S. Ct. 1070; 87 L. Ed. 1407.

In the case at bar, there is no doubt about the ability of Appellee to get a quick adjudication of the state law in the state courts. Appellee can simply file a bill in the state courts to quiet its title to the perpetual easement claimed by it, or the issue may be settled by appropriate action on the part of Appellant to enforce the payment claimed by it. *Railroad Commission v. Pullman Company*, supra.

II. THE DECISION BELOW IS NOT CORRECT

Appellee's second point is that the decision below is clearly correct. This is, of course, a question to be briefed and argued fully after this Court takes jurisdiction of the case. However, as pointed out in our Statement as to Jurisdiction, the decision of the Court below is clearly in conflict with *St. Louis v Western Union Telegraph Company*, 149 U. S. 465; *Memphis v. Postal Telegraph and Cable Company*, 139 Fed. 707, 145 Fed. 602; and *Bankers Trust Company v. Rator*, (1922) 258 U. S. 328.

A comparison of the language of the Missouri statute construed in the *St. Louis* case and of the statute relied on by Appellee here, insofar as it purports to grant an easement, will show that they are almost identical. So that the Court may see more easily, we quote the applicable language of the two statutes side by side:

Missouri Statute

(Appendix to Statement as to Jurisdiction p. 51)

"Any company incorporated for the purpose may construct lines of electric telegraph upon and along any of the highways and public roads and across any of the waters within the limits of this state by erection of the necessary fixtures, including posts, piers or abutments for sustaining the wires of such lines."

Mississippi Statute

(Appendix to Statement as to Jurisdiction p. 28)

"Any telegraph or telephone company chartered or incorporated by the laws of this or any other state of the United States shall . . . have the right to construct, maintain and operate telegraph or telephone lines through any public lands of this state and on, across and along all highways, streets and roads and across and under any navigable waters . . ."

In the *St. Louis* case the telegraph company made the same contentions as the telephone company makes here. This Court pointed out (149 U. S. 465, at p. 470) that the 1855 Act had been superseded just as it has in the case at bar. *A. & V. Railway Co. v. Cumberland Telephone and Telegraph Co.*, 88 Miss. 438, 41 So. 258. When the telegraph company made the contention that it had acquired vested rights under the 1855 Act by occupying streets, this Court said: "It was only a permission, a license, which might be revoked at any time and, further, whatever rights, if any, this defendant may have acquired to continue to use the streets already occupied at the time of the revision of 1866, *it cannot with any show of reason be contended that it received an irrevocable power to traverse the state and occupy any other streets and highways.*" (Italics ours) In the case at bar, it has been held that the telephone company, by virtue of their occupancy prior to repeal of the Mississippi Statute, can now use not only streets occupied by them prior to such repeal, but also other streets then in existence and those which may be built in the future, and they can never be charged for such use. We submit that this is in direct conflict with the opinion of this Court in the *St. Louis* case.

It is also in direct conflict with *Memphis v. Postal Telegraph and Cable Company*, supra. As pointed out in our Statement as to Jurisdiction (p. 18), the Court of Appeals has overruled the *St. Louis* case by implication and in attempting to distinguish the *Memphis* case, entirely overlooked the decision in the District Court showing clearly that the statute relied on by the telegraph company, just as in the *St. Louis* case, antedated any grant to the city.

As shown hereinbefore, and in our Statement as to Jurisdiction (p. 14), the Supreme Court of Mississippi in construing the Mississippi Statute, followed the decision of this Court in *St. Louis* holding that the statute granted a revocable license only. *Hodges v. Western Union Telegraph Company*, 72 Miss. 910.

Counsel for Appellee virtually admit (Motion p. 12) that the decision of this Court in the *St. Louis* case was impliedly overruled by the Court of Appeals, arguing that it has lost weight as authority by subsequent decisions of this Court, even though it has never been overruled. Counsel cite a number of cases involving telephone and other franchises. The cases cited from this Court, with one exception, are prior to *Postal Telegraph Company v. Richmond*, 249 U. S. 252 which cites *St. Louis* with approval. We will not now burden this Court with an attempt to distinguish each case cited individually, although study of each case will convince the Court that they are distinguishable. Those cases fall generally into three classes.

1. Those involving a deliberate grant of a franchise by municipal ordinance.

2. Those involving the grant of corporate charters conferring specific rights.

3. Those involving a deliberate grant by the State of certain franchise rights to those qualified who will take advantage of the state statute.

Only those cases arising under the third catagory could have any application to the *St. Louis* case. Of that group only *Russell v. Sebastian*, 233 U. S. 195 was from this Court. That decision is not contrary to the *St. Louis* decision because the language of the two acts construed was different. This Court in *Sebastian* pointed out a long legislative and judicial history in California evidencing the fact that an irrevocable grant was intended. Indeed, it was not contended otherwise. Where, as here, the bare language of the act itself must be relied upon, *St. Louis* governs. The legislative and judicial history of the Mississippi statute shows clearly no such irrevocable grant was intended. *Hodges v. Western Union Telegraph Co.*, supra; *Wilmut v. Covington County*, 221 Miss. 613, 71 So. 2d 184. (As to legislative history, see Statement as to Jurisdiction, pp. 10-11).

The fact that this Court, as counsel say, (Motion p. 12), considered but did not overrule *St. Louis*, indicates they did not think the two statutes comparable. If *Sebastian* limits *St. Louis* in any way, it could only be in determining that, under the particular California statute, the measure of their rights was not streets occupied, but territory contemplated in their original construction. If that test is applied here, Appellee would be put to proof that it built prior to 1890 for service to the present city. This they have not shown and cannot show.

If *St. Louis* and *Sebastian* are in conflict, then this Court can now choose to follow whichever case it deems to be correct. We submit that *Sebastian* was decided during that

period in our jurisprudence in which so many vested rights of public utilities and other private corporations were upheld, that a great body of that jurisprudence has been since repudiated. We have no hesitancy in asserting that *St. Louis* is more in accord with modern laws and judicial decisions concerning utilities.

The *Memphis* case is the only decision involving the right to charge for the use of streets under such a statute as is here involved. In that case, the Sixth Circuit held that the charge was valid. The Fifth Circuit has now held to the contrary. Counsel seek to further distinguish the case on the basis that the statute had not been previously construed by the Tennessee Supreme Court as has our statute. However, in making this argument they seek to run with the hare and the hounds. If the state rather than the Federal interpretation of similar statutes is to be accepted, then it must be accepted in full. Although, in *Hodges*, the Mississippi Court denied the right to charge, it did so on the basis that a *revocable* permit *then* stood unrevoked.

Counsel in their Motion (p. 9-10) seek to do that which neither of the lower Courts attempted to do; that is, distinguish the case of *Bankers Trust Company v. Raton*, supra. The rule of law as to estoppel set out in the *Raton* case is exactly applicable to the case at bar, but apparently was not considered by either lower Court. We submit that the distinction counsel attempts to make is not valid. In the *Raton* case the water company claimed it was operating under authority of a statewide grant such as Appellee claims here. However, it was shown that it had accepted a grant from the City limiting the franchise to twenty-five years. In the case at bar, Appellee claims it was operating under the statewide grant (Motion p. 10). It also accepted a fran-

chise from the City limited to a period of thirty years and requiring other considerations from the telephone company not called for by the statewide grant. (R. pp. 93-97). This Court held in the *Raton* case that the acceptance of the limited franchise from the City estopped it to clam under the state grant. We submit that the same principle of law is applicable to the case at bar. Counsel's distinction that the New Mexico courts had previously decided that the water company held under its grant from the City is not sufficient to distinguish this case from the *Raton* case. That was clearly not the basis of this Court's decision in *Raton*. It was only mentioned to show that the City had authority to grant the franchise. In the case at bar, the right of the City to grant the franchise is beyond question. The principle of estoppel is the same in both cases. A company which seeks and obtains a franchise from a City for its own advantage is estopped to deny that its rights are limited by the terms of the franchise which it sought and obtained. This principle is all the more applicable to the case at bar because the franchise was sought and obtained at a time during which the right of Appellee's predecessor to occupy the city streets was in litigation.

Counsel has not even attempted to answer our questions 2, 3, or 4 (Statement as to Jurisdiction, pp. 7-8). We will not attempt to burden the Court at this time by an argument on the merits, but simply refer the Court to the cases of *Commonwealth v. Warwick*, 185 Pa. St. 323, 40 Atl. 93; *Thomas v. West Jersey Railroad Company*, 101 U. S. 71; *Oregon Railway Company v. Oregonian Railway Co.*, 130 U. S. 1; *St. Clair County Turnpike Company v. Illinois*, 96 U. S. 63, as examples of authority showing that there is substance to the other points raised on the merits of this case.

As to our contention with reference to the equal protection clause of the Fourteenth Amendment, referred to by counsel in their Motion (p. 13), we submit that the case of *Los Angeles County v. Southern Calif. Telephone Company*, 32 Cal. 2d 378, 196 Pac. 2d 773, cited by them, does not overrule the decision of this Court in *Frost v. Corporation Commission*, 278 U. S. 515, which is applicable to the statute involved in the case at bar.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal and that, unless it should see fit to reverse and remand for dismissal of the bill of complaint, it should assume jurisdiction and reaffirm the true holdings of its former decisions.

If mistaken in our contention that this Court has jurisdiction of this appeal because there is yet some state question undecided, then this Court should reverse this cause and remand it to the District Court with directions to retain the bill pending a determination of proceedings to be brought with reasonable promptness in the State Court.

Respectfully submitted,

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CERTIFICATE

I, the undersigned Lester E. Wills, one of the attorneys for Appellant herein, hereby certify that I have served the foregoing Brief of Appellant Opposing Motion to Dismiss and/or Affirm upon Mr. Charles B. Snow, Milner Building, Jackson, Mississippi, Mr. O. Winston Cameron, Threefoot Building, Meridian, Mississippi, and Mr. John A. Boykin, Attorney, Southern Bell Telephone and Telegraph Company, Atlanta, Georgia, my mailing to each of them a true copy of said Brief of Appellant Opposing Motion to Dismiss and/or Affirm.

Witness my signature this the day of January, 1959.

.....

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